UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 16 Cr. 361 CS

TYRIN GAYLE, et al.,

Defendants.

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March 23, 2017
2:15 p.m.
White Plains, N.Y.

Before:

HON. CATHY SEIBEL,

District Judge

APPEARANCES

JOON H. KIM
United States Attorney for the
Southern District of New York
MAURENE COMEY
Assistant United States Attorney

SAMUEL BRAVERMAN
Attorney for Defendant Gayle
JOHN WALLENSTEIN

NEIL CHECKMAN
Attorney for Defendant Falls

DANIEL HOCHHEISER
Attorney for Defendant Brown

THEODORE GREEN
Attorney for Defendant Evans

BRUCE KOFFSKY
Attorney for Defendant Boykin

DECISION

THE COURTROOM DEPUTY: United States v. Tyrin Gayle.

THE COURT: Have a seat, everyone. Good afternoon Ms Comey.

MS COMEY: Good afternoon, your Honor.

THE COURT: And good afternoon to Mr. Green and Mr. Evans. Mr. Koffsky and Mr. Boykin. Mr. Hochheiser and Mr. Brown. Mr. Checkman and Mr. Falls. Mr. Wallenstein, you are sitting in for Mr. Braverman for Mr. Gayle and you are also representing Mr. Warren.

MR. WALLENSTEIN: Correct, your Honor.

THE COURT: I've got motions from everybody I think which I want to rule on. And I want to start with the motions to suppress which come from Mr. Brown and Mr. Evans.

Let me ask you, Mr. Green and Mr. Hochheiser, the government's of the view that the videos provide sufficient evidence of the circumstances and that we don't need live testimony. I assume you're not, you don't challenge the authenticity of the videos, so I will treat them as though they were the government's case at a hearing. Do you have any evidence you'd like to put on?

MR. GREEN: Well, as for Mr. Evans, I may offer testimony from the defendant at a hearing. I submitted an affidavit.

THE COURT: Call your witness, if you want to.

MR. GREEN: I didn't realize we were having a hearing

now.

THE COURT: I guess what I'm asking you is are you putting on any testimony?

MR. GREEN: Yes, I do plan to put testimony on at a hearing.

THE COURT: Are you saying you're not prepared to do it today?

MR. GREEN: Yes. My expectation was that the Court would schedule a hearing today.

THE COURT: I will schedule a hearing if you're not prepared to do it today. The government isn't putting on anything else?

MS COMEY: That's correct, your Honor.

THE COURT: And would you care to enlighten me about what you you would like to put on evidence regarding that's not clear on the video, or are you going to be challenging the accuracy of the video?

MR. GREEN: I'm not challenging the accuracy of the video. I'll probably be relying on the video a little bit. The issue is whether Mr. Evans, the only factual issue is whether Mr. Evans read and understood the rights before he signed the form that the agent asked him to sign. So that's in line with the declaration that was submitted by Mr. Evans.

THE COURT: Which I will obviously consider. But if you want to put on evidence that's fine.

What about you Mr. Hochheiser?

MR. HOCHHEISER: I would take essentially the same position. Mine might be slightly different because there's another issue where the government has asked in the alternative that you rely on a pre-video recitation of rights in the car ride over to the station.

THE COURT: I think the way I read what the government said was if I wasn't persuaded by what was on the video and that we needed to go there that they would put on evidence regarding that.

MR. HOCHHEISER: I think it would be useful for your Honor to hear testimony from my client on the issue of whether he knowingly, intelligently and voluntarily waived his rights, which I think is, obviously, as I stated in the motion, in question given how the events transpired on the video.

THE COURT: All right. That's fine. Then I won't rule on those today. How about Monday for the hearing? Can I do that, Alice? Can everybody do it Monday?

MR. HOCHHEISER: I'd ask for a little more time. My client is incarcerated at the MCC. I'd like to meet with him before the hearing.

THE COURT: How about Thursday? I'm picking randomly. I'd like to get a hearing date soon. What do we got? How about next Friday the 31st?

MR. GREEN: That's all right with me, Judge.

MR. HOCHHEISER: I'll be here anyway, Judge, on a different case.

THE COURT: You'll be in front of me on a different case on Friday the 31st?

MR. HOCHHEISER: Yes.

THE COURT: We don't have anything on our calendar but that could be our mistake. Let's plan on doing this. Would that work for you, Ms Comey?

MS COMEY: Yes, your Honor. Thank you.

THE COURT: If you think you'll be calling somebody in rebuttal, have him or her ready.

MS COMEY: Yes, your Honor.

THE COURT: All right. That shortens our agenda for today.

MS COMEY: May I ask what time you'd like to start on Friday?

THE COURT: Apparently I have something at ten o'clock.

MR. HOCHHEISER: I think it's on for ten o'clock. Status conference.

THE COURT: All right. 10:15.

MR. GREEN: Is that for both defendants?

THE COURT: Yes. I guess we could do one in the morning or one in the afternoon or back-to-back. I don't imagine it's going to take very long.

MR. GREEN: I'll show up at 10:15.

THE COURT: If you don't mind we could probably get them both out of the way in the morning.

Apart from those motions, the others are, it seems to me, purely legal issues. The disclosure motions, this is the dance we go through in every case. Defense lawyers push the global replace in their word processor, the government does the same, and I do the same.

With respect to the application for disclosure of *Brady* material, the government has to comply with *Brady* material, it knows it has to comply with *Brady*. Beyond that I don't know what you want me to do for you.

With respect to the motion for disclosure of co-defendants' post-arrest statements for purposes of *Bruton*, obviously any such statements that the government may offer that implicate co-defendants will have to be Brutonized. But production is premature at this stage. We don't know who is going to trial and whose statements may be offered. I don't see any reason not to do in this case what everybody does in every case, which is the government should either disclose those statements to defense counsel along with proposed redactions that it believes will meet the requirements of *Bruton* and *Bruton*'s progeny, either a week before motions *in limine* are due so that the defendants can make motions *in limine*, or the government should make a motion *in limine* itself

seeking admission of any such statements and giving proposed redactions.

Bill of particulars. The law is very clear, I won't repeat it. It's accurately stated in the parties' briefs. Almost everything the defendants are asking is evidentiary detail to which they know they're not entitled and they know I'm not going to give it to them. The defendants have an abundance of materials that they can use to prepare for trial.

There are a couple of things I'm going to direct. (a) I do think the government is required to at some reasonable point before trial identify co-conspirators so that the defendants have some idea whose statements may be admitted against them as co-conspirator statements. And there are a few other things I'm going to direct the government to disclose, not because they are required but because I think they will assist in evaluating the case and in trial prep and I don't think the government minds giving this information. It may well have already given it. I don't think the government minds giving this information as long as it doesn't restrict the government's proof at trial and it's not going to restrict the government's proof at trial.

What I would like the government to do is specify, if it hasn't already and if the information isn't otherwise available in discovery, any CI or undercover drug sales and same with respect to any gun transactions involving an

undercover or a CI. I suspect the discovery already makes that clear but if it doesn't the government should make it clear. And also, if the government is planning on proving up any use of a weapon or brandishing of a weapon, in particular confrontations or particular shootings that the government knows about, it should specify what they are. The government is not going to be held to that. If two days before the trial a witness tells the government about a shooting for the first time, it's not going to be inadmissible because it wasn't previously disclosed. But to the extent the government now is aware of specific instances where one of these defendants used or brandished a weapon, it should disclose it. And as we get closer to trial I will ask the government to tell any defendant who asks, and this may have already happened, whether the government's theory at trial is going to be that the person personally held the weapon or aided and abetted or whether it's going to be a Pinkerton theory. Again I don't think this is required. I think what the defendants are asking for is essentially what the witnesses are going to say about their drug activities or drug possession and they're just not entitled to that yet. They will get it in advance of trial because I've ordered early disclosure of the 3500.

So why don't we say within two weeks the government will disclose the few things that I've directed but otherwise the motion for particulars is denied.

As to the severance motions, again the parties accurately state the law in their briefs. I'm not going to repeat it. All defendants are charged together in the narcotics conspiracy. The fact that some are charged in the racketeering conspiracy and some aren't and that some are alleged to have committed acts of violence and some aren't is insufficient to warrant severance under Second Circuit law. The only argument defendants advance is spillover prejudice, an argument that almost invariably fails, and for good reason, as the Circuit recognized in U.S. v. Chang An-Lo, 851 F.2d 547, 557. Differing levels of culpability of proof are inevitable in any multidefendant case and don't warrant separate trials absent something really prejudicial. The court made clear in Locasio, 6 F.3d 924, 947 that there is no constitutional problem with trying even the marginal defendants along with the most heavily involved defendants and that spillover prejudice doesn't warrant a severance absent prejudice so serious as to amount to a miscarriage of justice. U.S. v. Aloi, 511 F.2d 585, 598.

The three defendants who have made this motion are Brown, Falls and Boykin. As to Brown and Falls, they have almost no leg to stand on. While they are not charged with having personally committed acts of violence they are charged in the RICO conspiracy count and the acts of violence allegedly committed by the co-defendants are admissible against them on

that count as evidence of the existence of the enterprise and of its nature, goals and actions. See U.S. v. DiNome, 954 F.2d 839, 843-44; U.S. v. Diaz, 176 F.3d 52, 103; and U.S. v. Brady, 26 F.3d 282, 287. So even if I were to sever, all the evidence that those defendants are concerned about would still be admissible against them. It so happens the government represents that there will be evidence that Brown and Falls participated in or condoned violence themselves and so the risk of them being unfairly tarred with the actions of others is reduced. But even if that were not the case there's no basis for severance for the RICO defendants.

Boykin is not named in the RICO on so he has a somewhat stronger argument, but it is not an argument strong enough to warrant severance. There is a great deal of overlap. And it's apparent from the indictment, apart from the government's representations, that there is a great deal of overlap between the proof of the narcotics conspiracy and the proof of the RICO conspiracy. And likewise all defendants are charged in a 924(c) count relating to the narcotics conspiracy. So evidence of that count will include evidence of violence to the extent those acts further the drug conspiracy. And any acts of violence or firearms possession that furthers the drug conspiracy would be admissible against Boykin on the drug conspiracy count because it would tend to show the existence and methods of the conspiracy. See U.S. v. Salameh, 152 F.3d

88, 111. So if I were to sever, that would result in enormous duplication of evidence and inefficiency and much of the evidence would come in at a separate trial anyway. There may well be some evidence that wouldn't come in at a separate trial, but that mere fact isn't enough. It has to be evidence that would really result in a miscarriage of justice. And I just don't see that here. The jury is going to be able to keep straight what Mr. Boykin is alleged to have done versus other people. Similarly the risk of spillover prejudice is reduced if, as the government represents, the evidence against Mr. Boykin is going to include him carrying a gun and his awareness that even though he's not in the RICO he was dealing drugs on turf controlled by the RICO enterprise.

In response to the government, Mr. Boykin has not pointed to any specific act of violence that he believes would be admissible only on the RICO count and not on the narcotics conspiracy count, nor has any other defendant moving for severance responded to the government's arguments by pointing to any specific act that would be admissible only against co-defendants but not as to him. But if it turns out there is sufficient evidence the relevant defendants can seek a limiting instruction that it shouldn't be considered against them. They just need to be sure to tee it up in time for us to discuss it before the evidence is offered. With that precaution of a limiting instruction and in light of the fact that the case is

not so complicated that the jury wouldn't be able to follow a limiting instruction, the risk of unfair prejudice will be minimized and the efficiencies of a joint trial will be preserved. See U.S. v. Devillio, 983 F.2d 1185, 1192-3; and U.S. v. Hernandez, 85 F.3d 1023, 1029-30; U.S. v. Rosa, 11 F.3d 315, 341-42; U.S. v. Lasanta, 978 F.2d 1300, 1306, which was abrogated on other grounds by Florida v. White, 526 U.S. 559; and U.S. v. Potamitis, 739 F.2d 784, 790.

Certain defendants have made a motion to dismiss the 924(c) counts on the theory that that statute is void for vagueness along the lines of the Johnson case, 135 S.Ct. 2551. They acknowledge that the Second Circuit has already rejected that theory in Hill v. U.S., 832 F.3d 135. They make the motion only to preserve the issue. So I deny the motion for the reasons stated by the government and under the authority of Hill and the issue is preserved.

Apart from the suppression motions, the motion that's left is Mr. Brown's motion to dismiss Counts 1, 5 and 9 under the Juvenile Delinquency Act. Anything more you want to say on that Mr. Hochheiser?

MR. HOCHHEISER: No. I'll stand by the position I have outlined in my papers.

THE COURT: So the argument is that Counts 1, 5 and 9 have to be dismissed because Mr. Brown did not do anything in connection with those counts after his 18th birthday which was

April 26, 2016. Each of those counts, as the government points out, charges a continuing offense. And the indictment clearly charges that the conduct continued into May 2016. If as the evidence plays out the government can't back up those allegations at trial, the defendant will have a good Rule 29 motion. And if there is evidence but it's thin the defendant will have a good jury argument. But at this point essentially for the reasons stated by the government I can't dismiss anything as a matter of law. The allegation is the conduct continued into May. We'll have to see.

The government is also correct that evidence of conduct before the defendant's 18th birthday is admissible in connection with a continuing offense that continues past the defendant's 18th birthday, as is alleged here. See U.S. v. Wong 40 F.3d 1347, 1367. I do think it's the government's burden to prove that the defendant ratified his participation in the offenses on or after his 18th birthday. I don't think it's the defendant's burden to prove that he withdrew or ceased his participation. But that's a factual question to be raised at trial not by a pretrial hearing. U.S. v. Welch, 15 F.3d 1202, 1208-1210.

Am I right that that covers everything except the suppression motions?

MS COMEY: I believe so, your Honor. Yes.

THE COURT: All right. So as to Mr. Brown, the issue

is essentially going to be whether the agent's statement about "you're not going anywhere" or any other circumstances render Mr. Brown's statements, render his waiver less than knowing and voluntary. And as to Mr. Evans, the issue is going to be the agent's failure to include all the required warnings, what effect that should have on the admissibility of the statement, and whether if the statement is inadmissible that also requires suppression of the evidence obtained via the defendant's consent to search the phone. And we will deal with those next Friday.

Anything more we should do now? All right. And the few things I've ordered the government to disclose you can do within two weeks, Ms Comey?

MS COMEY: Yes, your Honor.

THE COURT: All right. So it seems like a long way off to trial but I don't think we have anything more scheduled until, apart from the suppression hearing, until after motions *in limine*, right?

MS COMEY: I believe that's correct, your Honor. The final pretrial conference as I have it is August 28th.

THE COURT: I'll see Mr. Brown and Mr. Evans on Friday and I will see everybody else in August unless something comes up. Thank you.

(Proceedings adjourned; 2:40 p.m.)